On October 23, 1961, two agents for the Illinois Division of Narcotics Control visited a tavern in Colp, Illinois, with whose operation defendant was associated. The two officers were accompanied by an informer named Prigano, who had a prior acquaintanceship with defendant. The purpose of their visit was to see if narcotics could be purchased at the tavern. It is undisputed that the officers subsequently "made a deal" to purchase a quantity of marijuana for $50, and that they paid such a sum to one James Houston and received from him a sack containing crushed leaves. A subsequent chemical analysis of the leaves disclosed them to be of a non-narcotic species. Indeed, Houston, who was jointly indicted with defendant and entered a plea of guilty, testified that the substance was no more than common milkweed. The conflicts in the evidence center around the question of whether or not defendant was a participant in the fraudulent and unlawful sale.

According to the agent who went into the tavern, he was introduced to defendant by the informer and the three men then sat at a table having drinks. After some perfunctory conversation about stimulant pills and prostitution, the informer indicated that he wanted to buy some narcotics and marijuana. Houston, who was also acquainted with the informer, entered the tavern and joined the others at the table. A discussion concerning the purchase of narcotics was continued. After a short time Houston purportedly had a whispered conversation with defendant and stated: "We've got about a half pound or a pound of marijuana that you can have for $150." A price of $50 was finally agreed upon, after which Houston, the informer and

the two agents drove to Carbondale where Houston entered a house for a short time and returned with a sack containing crushed leaves. They then returned to the parking lot of the tavern in Colp, at which point Houston gave the sack of leaves to the agents and received $50. When they entered the tavern, according to the further testimony of the agent, defendant was standing at the end of the bar and inquired whether the "stuff" was satisfactory, after which Houston and defendant stepped into a back room where the former handed defendant the money he had received.

Defendant denied taking part in any discussion concerning pep pills or narcotics, and stated that after Houston entered he left the table and returned only to serve drinks. This was corroborated by a bartender, a waitress, the tavern handyman, and Houston. Likewise, he denied that he knew why the group left the tavern, or where they were going, or that he had on their return made any inquiry about the "stuff." He did, however, admit that he had received some money from Houston, but denied that it had been in a back room. His explanation was that he had done no more than change a large bill for Houston, a part of which he retained in satisfaction of a prior indebtedness. In this defendant was supported by the bartender who said that she had the only key to the back room and that defendant had not gone there, that Houston had first asked her to change the bill, and that she had sent Houston to defendant for change because the cash register had already been checked out.

The question presented here was considered by the Supreme Court of Illinois in its opinion in this case (App. 3, 4, *infra*) and was decided adversely to the appellant.

The Question Is Substantial

1. The question presented in this case is one of great substantiality because the cases upon which it rests have never been overruled although judges of this Court have regarded them as having been discarded, *Ferguson* v. *Skrupa,* 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed. 2d, 93; *Griswold* v. *Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, ... L. Ed. 2d. ..... The fact remains that the principles enunciated in *Lochner* v. *New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937, *Coppage* v. *Kansas,* 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441, *Adkins* v. *Children's Hospital,* 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed 785, and *Jay Burns Baking Co.* v. *Bryan,* 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813, have never been expressly overruled although the change in the social values of the nation has caused the results achieved in them to be discredited.

In the present case, there need be no prejudice against the result which would be achieved if the Illinois Statute in question were to be struck down as violating a due process clause of the XIVth Amendment. The defendant was convicted of a crime which makes illegal an act which has no bearing whatsoever upon the health, welfare, safety and morals of the people of the State of Illinois. In fact, the defendant was convicted of declining to sell to an agent of the State of Illinois, a narcotic substance.

We submit the following quotation from *Lochner* v. *New York,* 198 U.S. 45, 56:

> It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise, the Fourteenth Amendment would have no efficacy and the legislatures of the State would have unbounded power, and it would be enough to say

that any piece of legislation was enacted to conserve the moral, the health or the safety of the People; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this Court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?

We further submit the following language from *Coppage v. Kansas*, 236 U.S. 1, 15:

> Now, it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power. "Its true character cannot be changed by its collocation," as Mr. Justice Grier said in the *Passenger Cases*, 7 How. 283, 458. It is equally clear, we think, that to punish an employer or his agent for simply proposing certain terms of employment, under circumstances devoid of coercion, duress, or undue influence, has no reasonable relation to a declared purpose of repressing coercion, duress, and undue influence. Nor can a state, by designating as "coercion" conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty or of property rights; for to permit this would deprive the Fourteenth Amendment of its effective force in this regard.

Similarly, in *Jay Burns Baking Co.* v. *Bryan,* 264 U.S. 504, 513, the court had this to say concerning a police regulation of the State of Nebraska:

> Undoubtedly, the police power of the state may be exerted to protect purchasers from imposition by sale of short weight loaves. * * * Many laws have been passed for that purpose. But a state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. * * * Constitutional protection having been invoked, it is the duty of the court to determine whether the challenge provision has reasonable relation to the protection of purchasers of bread against fraud by short weights and really tends to accomplish the purpose for which it was enacted.

The court in each of these cases has demonstrated its concern over the reasonableness of state legislation which creates police regulation. Although it has become fashionable in recent years to characterize these decisions as having been discredited and the court has declined to follow them, similar results have been achieved by applying other sections of the Constitution. For example, in *Griswold* v. *Connecticut,* 381 U.S. 479, the court struck down a Connecticut statute which prohibited the use of contraceptive devices or the counseling by any person to use a contraceptive device. The court there recognized a constitutional right to privacy arising from the First, Third, Fourth and Fifth Amendments to the Constitution. Having recognized the right, the court was then forced to make the further determination of whether the use of contraceptive devices was within the realm of privacy. Although the court expressly stated that it was not determining the "wisdom, need, and propriety of laws that touch economic

problems, business affairs, or social conditions" it is apparent that a value judgment was made by the court.

So in the cases which we cited above, the court there, too, was making a value judgment and we question whether there is any real difference in making a value judgment under one section of the Constitution concerning a right to privacy and making a value judgment under another section of the Constitution concerning unreasonable police regulations which deprived an individual of his liberty without due process of law.

We submit that the court must resolve this question which in spite of thirty years of legal history remains unresolved.

Respectfully submitted,

CHARLES A. BELLOWS
Ten South LaSalle Street
Chicago, Illinois 60603
Attorney for Appellant